

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

GARY M. THEBO, )  
 ) No. CV 08-3121-HU  
Plaintiff, )  
 )  
v. )  
 )  
MICHAEL J. ASTRUE, ) OPINION AND  
Commissioner, Social ) ORDER  
Security Administration, )  
 )  
Defendant. )  
\_\_\_\_\_ )

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3 HUBEL, Magistrate Judge:

4 Gary Thebo brings this action pursuant to Section 205(g) of  
5 the Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain  
6 judicial review of a final decision of the Commissioner of the  
7 Social Security Administration (Commissioner) denying his  
8 application for Disability Insurance benefits under Title II of the  
9 Social Security Act.

10 **Procedural Background**

11 Mr. Thebo filed an application for benefits on March 1, 2005.  
12 The application was denied initially and upon reconsideration. Mr.  
13 Thebo requested a hearing, which was held on August 7, 2007, before  
14 Administrative Law Judge (ALJ) Gary Elliott. On September 18, 2007,  
15 the ALJ issued a decision finding Mr. Thebo not disabled. The  
16 Appeals Council denied Mr. Thebo's request for review on September  
17 18, 2008, making the ALJ's decision the Commissioner's final  
18 decision.

19 Mr. Thebo was 35 years old at the time of the ALJ's decision,  
20 and has a college education. He has not engaged in substantial  
21 gainful activity since his alleged onset date, October 1999. His  
22 date last insured is December 31, 2004. Mr. Thebo alleges  
23 disability based on a combination of impairments, including  
24 degenerative disc disease of the lumbar spine, degenerative joint  
25 disease of the ankles, and post-traumatic stress disorder (PTSD).

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**Medical Evidence**

In February 1995, Mr. Thebo was diagnosed with mild obstructive ventilatory defect. Tr. 351. On February 5, 1997, Mr. Thebo applied to the Veterans Administration (VA) for service connected disability for the respiratory condition and a right fifth metacarpal fracture. He also requested that the VA consider new evidence of disabling conditions of the right and left knees, back and digestive system, as well as other conditions including contact dermatitis, paralysis, chronic left hand disability, chronic headaches, chronic fatigue syndrome, and hypertension. Tr. 72. On January 13, 1997, the VA awarded Mr. Thebo 10% disability for the respiratory condition. Id. The VA denied Mr. Thebo's other claims. As of January 13, 1997, Mr. Thebo had disability ratings of 10% from tinnitus, which had been awarded on January 13, 1995, and 10% for exertional asthma and chronic cough. Tr. 75.

On July 21, 1999, Mr. Thebo requested medical treatment for chronic joint aches. Tr. 454. His chart note recorded that in 1997, he had been referred to a rheumatology clinic for these complaints, but had not shown up for appointments and had been terminated as a patient. Tr. 454, 455-57.

In 2000, Mr. Thebo was seen at VA clinics complaining of shortness of breath, chest constriction, sweating, exhaustion, coughing, headaches, tingling in his arms, hands and fingers, and a decrease in peripheral vision. See, e.g., tr. 386, 401, 407.

On February 25, 2000, he called the VA with complaints of pain in his chest upon deep breathing for the past two months and

1 hemoptysis (coughing up blood) for the past four years. Tr. 452. On  
2 February 27, 2000, Mr. Thebo presented at the VA reporting  
3 hemoptysis for five years, saying the volume of blood had recently  
4 increased from six to 12 ounces per day.<sup>1</sup> Tr. 449. Mr. Thebo  
5 described the blood as "bright red," tr. 451, and also as "dark."  
6 Tr. 449. He reported shortness of breath and lightheadedness, not  
7 controlled with Azmacort and albuterol. Id. Mr. Thebo also  
8 complained of chronic chills and night sweats without fever,  
9 decreased energy, multiple joint aches with swelling, and diarrhea  
10 for the past three to four months. Id. He was seen by Joseph  
11 Sanchez, M.D. Dr. Sanchez's examination of Mr. Thebo was  
12 unremarkable; Dr. Sanchez noted that no hemoptysis was seen and  
13 that he "doubt[ed] massive hemoptysis." Tr. 450. X-rays of the  
14 chest in 1995 and 1996 had been normal. Tr. 342. On February 29,  
15 2000, a CT scan of the chest was unremarkable except for  
16 enlargement of the main pulmonary artery. Tr. 376. However, on  
17 March 4, 2000, and April 4, 2002, pulmonary function testing  
18 indicated a severe ventilatory defect of mixed etiology. Tr. 480,  
19 490. An echocardiogram on October 25, 2002, was normal. Tr. 468.

20 Between May 8 and 18, 2000, Mr. Thebo was given a whole body  
21 bone scan. Tr. 470. There was increased radiotracer uptake at the  
22 right ankle's insertion of the Achilles tendon and at the shoulders  
23 and sacroiliac joints, likely degenerative. Id. X-rays of the  
24 lumbosacral spine and sacroiliac joints showed normal vertebral  
25 body heights and alignment, mild disk space narrowing at L3-4 and  
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27 <sup>1</sup>Twelve ounces is 3/4 of a pint.

1 L4-5, and slight sclerosis attributed to mild degenerative disease.  
2 Tr. 474. Imaging of both feet showed some minimal degenerative  
3 changes and minimal spurring. Id. Images of both hands showed no  
4 evidence of erosive changes or periostitis to suggest an  
5 inflammatory arthropathy. Id. Previous MRIs of the cervical and  
6 thoracic spine, taken in June 1996, had been normal. Tr. 364, 365.

7 On May 16, 2000, Mr. Thebo was seen by Edwin Mante, M.D. for  
8 a neurological examination. Dr. Mante wrote that cranial nerves  
9 were normal, the motor system showed no weakness, atrophy or  
10 abnormal muscle tone, deep tendon reflexes were brisk and equal  
11 without Babinski's sign, sensory examination was normal, there were  
12 no signs of ataxia on a coordination test, and gait was normal. Tr.  
13 416. Dr. Mante diagnosed depression and tension headache. Id.

14 On June 20, 2000, Mr. Thebo was examined by K.L. Casey, M.D.,  
15 chief of neurology. Tr. 409. Vision testing was normal. Tr. 408.  
16 Musculoskeletal examination revealed "giveaway" weakness, with  
17 initial strength upon strong challenge followed by laxity. Id.  
18 Sensory examination was inconsistent, first showing loss of  
19 positional sense in the toes and vibrational sense in the lower  
20 extremities, and subsequently showing regained positional sense in  
21 the toes and vibrational sense throughout the lower extremities.  
22 Tr. 409. Dr. Casey's impression was muscular weakness and a sensory  
23 examination inconsistent with a physiologic lesion, without  
24 evidence of any neurologic disease. Id.

25 On July 17, 2000, Mr. Thebo was seen by Irene Young, M.D., for  
26 complaints of decreased breathing capacity and fatigue, intense  
27

1 headaches associated with coughing, passing out from violent  
2 coughing approximately once a week, incontinence, and multiple  
3 arthralgias and myalgias. Tr. 401. He described his muscles feeling  
4 like he "ran a marathon." Id. He also reported decreased and  
5 blurred vision. Id. His current medications included Naprosyn,  
6 Tylenol #3, and asthma inhalers. Id. Dr. Young noted that Mr. Thebo  
7 had been worked up for seizures by neurologists, with negative  
8 results. Id. Examination of his extremities revealed strength of  
9 4/5 with "breakaway weakness noted in all muscles tested." Id.

10 An MRI of the brain and cervical spine on July 24, 2000,  
11 showed normal head and no cervical spinal or spinal canal  
12 abnormalities. Tr. 387, 461-62, 464.

13 On November 13, 2000, Mr. Thebo was again discharged from the  
14 rheumatology clinic for failure to keep scheduled appointments. Tr.  
15 384.

16 On July 14, 2000, Mr. Thebo was seen for a psychological  
17 evaluation by Linas Bieliauskas, Ph.D. Tr. 382-83. Mr. Thebo  
18 reported that he had been exposed to biological weapons in December  
19 1991 during the Gulf War, and suffered from asthma, coughing spells  
20 associated with fainting and incontinence, tinnitus, headaches,  
21 poor vision, frequent vomiting, osteoporosis, and osteoarthritis as  
22 a result of this exposure. Tr. 282. Mr. Thebo and his wife stated  
23 that the symptoms began immediately after the exposure and had  
24 become increasingly worse. Id. Mr. Thebo related that 13 of the 14  
25 men in his unit exposed to the biological weapon were dead. Id.

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1 On February 12, 2001, Lynn Hall, Ph.D., wrote a letter to  
2 support Mr. Thebo's claim for service connected PTSD. Tr. 510-11.  
3 Dr. Hall wrote that she had met with Mr. Thebo on January 23, 2001,  
4 and that during the meeting he described a "constellation of  
5 symptoms characteristic of PTSD," related to "work he had to do as  
6 an MP at gruesome crime scenes and as a witness to the aftermath of  
7 atrocities and catastrophic epidemics ... in Bosnia, Egypt,  
8 Afghanistan, Rwanda and Kuwait." Id. The symptoms Mr. Thebo  
9 described included frequent flashbacks and nightmares, intrusive  
10 memories of his military traumas, lack of interest in activities,  
11 feelings of detachment and a sensation that things were "moving in  
12 slow motion," the belief that "death is just around the corner" for  
13 him, intense psychological distress when reminded of the trauma,  
14 outbursts of anger, especially when watching TV news about  
15 politics, difficulty falling and staying asleep, avoidance of  
16 thoughts, feelings, activities, places and people who reminded him  
17 of the traumas, social isolation, intense fear of being touched on  
18 the face, and survival guilt after attending a murder scene in  
19 which the victim was a friend. Id.

20 On April 9, 2002, Mr. Thebo was given a psychological  
21 evaluation by two psychiatrists, Kinh Phan, M.D., and Stan Golec,  
22 M.D., and a psychologist, Robert de Young, Ph.D., in connection  
23 with his application for service-connected disability for PTSD. Tr.  
24 523-26. Doctors de Young and Golec wrote that Mr. Thebo reported  
25 enlisting in the Army in 1989 and receiving an honorable discharge  
26 in 1995. Tr. 526. Because Mr. Thebo did not bring copies of his  
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1 military papers, his information about his time in the military  
2 could not be corroborated. Id.<sup>2</sup>

3 Mr. Thebo reported that he had been in the Military Police and  
4 the Protective Service Division, as well as being a combat life  
5 saver and trained in air assault. Id.<sup>3</sup> He said he served in the  
6 Gulf War, in Bosnia during the conflict, and "Somalia and/or  
7 Rwanda, although the [patient] was not completely certain which  
8 country at different points of the interview." Id. He reported  
9 experiencing many stressful events while he was in the military. He  
10 said he had participated as a test subject in a project called  
11 "Blast Over Pressure" in Albuquerque, New Mexico, a test of ear  
12 protectors that involved exposing Mr. Thebo and other soldiers to  
13 increasingly louder C-4 explosions from a few feet away. Mr. Thebo  
14 said he was removed from the project "when his body began to break  
15 down and he began to defecate blood." Tr. 526. Mr. Thebo reported  
16 two traumatic occurrences while he was stationed in Germany:  
17 cleaning up the body parts of a young girl who committed suicide by  
18 standing in front of a train, and later learning that the father of  
19 the girl's unborn child was someone he knew; and cleaning up two  
20 crime scenes which were related to the murder by decapitation of  
21 one of Mr. Thebo's friends. Id.

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22  
23 <sup>2</sup> Although Doctors Phan, Godec and deYoung had no documents  
24 corroborating Mr. Thebo's statements to them about his military  
25 service, Mr. Thebo's DD-214 (Discharge from Active Military Duty)  
26 is in the record before the court. Tr. 71.

27 <sup>3</sup> Mr. Thebo's DD-214 states that Mr. Thebo's primary  
28 specialty was military police for four years and three months,  
and that his military education was nine weeks of law enforcement  
training and two weeks of air assault school. Tr. 71.



1 Mr. Thebo reported that in Saudi Arabia, he was exposed to a  
2 radioactive substance while burying Scud missiles, to which he  
3 attributed blisters that appeared on his face, and that he had been  
4 told by a military doctor he had radiation burns on his lungs, but  
5 was later told by the VA that no such condition existed. Tr. 527.  
6 He said that in Bosnia, he was ordered to demolish a building with  
7 teenagers inside, killing them, and in either Rwanda or Somalia, he  
8 was ordered to first bury, then unbury, bodies after a massacre,  
9 with the victims' relatives standing nearby. Id. He said the flesh  
10 of the bodies had been eaten away by "Eboli." Id.<sup>4</sup>

11 Mr. Thebo reported unwanted thoughts, dreams of swimming in  
12 body parts, worries about "someone invading him," and seeing images  
13 of body parts in different colors. Id. He said he had difficulty  
14 sleeping and was irritable, having "punched every door in the  
15 house," and once throwing a knife into a wall. Tr. 527-28. He  
16 denied hitting anyone, but later in the interview said he was once  
17 violent toward a non-commissioned officer and told to see a  
18 psychiatrist. Tr. 528. He said he is hyper-vigilant about  
19 "whatever," and is sensitive to sounds. Id.

20 Dr. Phan wrote that Mr. Thebo was "inconsistent about the  
21 duration of" his symptoms, but said he had only noticed them to be  
22 a problem for the past two weeks to a month. Tr. 525.

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24 <sup>4</sup> The DD-214 in the record states that Mr. Thebo served  
25 overseas for a total of two years, 10 months, and 27 days, but it  
26 does not reveal where he served overseas or his actual  
27 assignments there. Likewise, there is no evidence in the record  
before the court showing any medical treatment in the military or  
shortly thereafter for any of the conditions alleged to have been  
brought on by these assignments.

1 The examiners concluded,

2 Mr. Thebo ... presents with very unusual description[s] of his  
3 role in the military and many unusual stressful events. While  
4 it is possible that he has experienced one or more events that  
5 were traumatic in nature, the way in which he relayed the  
6 above described events and the symptoms he reports to be  
7 experiencing is [sic] very internally inconsistent and not at  
8 all consistent with a diagnosis of PTSD. It appears that some  
9 of this inconsistency is due to voluntary distortion of the  
10 [patient's] circumstances, possibly for some secondary  
11 motivation. It also appears that the [patient] has some  
12 characterological problems that contribute to his  
13 difficulties.

14 Tr. 529. Dr. Phan wrote in an addendum that Mr. Thebo gave a  
15 "bizarre history of events without documentation," which appeared  
16 "more fictional than delusional." Tr. 523. He found no evidence of  
17 psychosis. His cognitive examination, particularly orientation, was  
18 "nonspecific and inconsistent." Id. In Dr. Phan's opinion, the  
19 examination suggested "possible malingering or conversion symptoms,  
20 rather than PTSD." Id.

21 The examiners' diagnoses were malingering and possible  
22 conversion disorder, with a provisional diagnosis of borderline  
23 personality disorder. Tr. 523, 529.

24 Between September 6, 2001, and April 29, 2002, Mr. Thebo was  
25 given numerous diagnostic tests, including a gastric emptying scan,  
26 x-rays of the lumbosacral spine, chest, and pelvis, and a three  
27 phase bone scan. Tr. 561. The gastric emptying scan was normal,  
28 with no evidence of gastroesophageal reflux. Tr. 561-62. The x-rays  
revealed mild degenerative disk disease of the lumbar spine,  
"minimally progressed" from the prior study, and the pelvis showed  
a benign bone island in the right proximal femur. Tr. 565. The bone  
scan indicated some soft tissue inflammation in the region of the

1 Achilles tendon bilaterally, but there was no evidence of bone  
2 infection or inflammation. Tr. 565-66. X-rays showed normal cardiac  
3 and mediastinal silhouette, and no pulmonary nodules, focal air  
4 space disease, pulmonary edema, or pleural effusion. Tr. 564.

5 Mr. Thebo received another psychological assessment on October  
6 23, 2002. Tr. 514. Mr. Thebo reported that he had been exposed to  
7 radiation as a result of having the depleted uranium from an  
8 artillery round "c[o]me back on him" in Bosnia. Id. The radiation  
9 had caused him to have osteoarthritis in the back and hand, as well  
10 as seizures in which his temperature fluctuated from 105° to 93°.  
11 Id.

12 With respect to his military duties, Mr. Thebo reported that  
13 he attended "every school they had in the military because a  
14 General liked me," including school for Rangers, Special Forces,  
15 and medics. Id.<sup>5</sup> He related that he had guarded several well-known  
16 generals and the Pope, with the Pope telling Mr. Thebo that "all  
17 the Serbs should be killed because they are not Catholic;" engaging  
18 in multiple classified missions too secret to appear in his  
19 military records; being directly involved in 12 combat missions  
20 when in Bosnia, including once being separated from his unit for  
21 six months, reported as dead, and eventually being rescued by a  
22 young Bosnian; and the "Blast Over Pressure" project. Id.

23 The examiner wrote that Mr. Thebo was a "very vague and poor  
24 historian," with "multiple minor discrepancies." Tr. 515. The  
25 examiner's diagnoses were the same as those found at the earlier

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27 <sup>5</sup> See footnote 1.

1 assessment: Malingering or Conversion Disorder and Borderline  
2 Personality Disorder. Tr. 516.

3 On April 28, 2005, Frank Lahman, Ph.D., did a records review  
4 on behalf of the Commissioner, for the period between October 11,  
5 1999 and December 31, 2004. Tr. 575. Dr. Lahman found no medically  
6 determinable mental impairment, writing that the "primary  
7 [diagnosis] was malingering." Tr. 575, 587. Scott Pritchard, D.O.  
8 and Mary Ann Westfall, M.D. did records reviews on behalf of the  
9 Commissioner for the same period. Their conclusions were that Mr.  
10 Thebo had degenerative disc disease of the lumbar spine and  
11 degenerative joint disease of the ankles, with minimal functional  
12 limitations noted. Tr. 590-92. They opined that these impairments,  
13 and Mr. Thebo's allegations of shortness of breath, exertional  
14 asthma, and joint aches, limited Mr. Thebo to light exertion. Tr.  
15 597.

16 On April 4, 2006, Mr. Thebo was seen for an initial  
17 psychiatric assessment by psychiatric nurse practitioner Kevan  
18 Olson. Tr. 625. Mr. Olson observed that Mr. Thebo had a labile  
19 mood, rapid pressured speech, grandiosity, and delusions. Tr. 626.  
20 Mr. Thebo described his military history as including duty in  
21 Bosnia, Sarajevo, Panama, Desert Storm, and Rwanda. Tr. 628. He  
22 related disposing of bodies in Rwanda with the victims' children  
23 watching him "throw lye over their parents." Tr. 628. Although the  
24 children were starving, he was told not to feed them because  
25 military rations would make them die. Id. He also related that some  
26 of his friends died in the Pentagon on September 11, 2001. Id.

1 Mr. Thebo described heightened hearing and seeing things not  
2 perceived by others, including alien spaceships. Tr. 629. He  
3 reported having been abducted by aliens since he was a child and  
4 said that when he was in the military, aliens abducted his entire  
5 company, although "most don't recall it." Id. He told the examiner  
6 aliens give off a sound that puts others to sleep, and that the  
7 military started using the sounds to make people crawl around. Id.  
8 He stated that the military "took something out of my back," and  
9 used the sound to "make you so you can't move." Id.

10 On September 14, 2006, Mr. Thebo was seen for a recurrent  
11 rash, which he attributed to Sarin exposure in the military while  
12 guarding Scud missiles. Tr. 622. He was diagnosed with follicular  
13 hyperkeratosis. Tr. 622-23.

#### 14 **Hearing Testimony**

15 Mr. Thebo testified at the hearing that for the previous five  
16 years he hadn't "been able to write hardly anything other than my  
17 signature," because of swelling in his hands "due to blast-over  
18 pressure where I sat on a blast pad and it [sic] blew C-4 up next  
19 to me." Tr. 838. He said that although he used to be good at math,  
20 he was now unable to do the "normal math that I used to do" because  
21 of his medications, PTSD and "emotional ups and downs." Id. Mr.  
22 Thebo said his memory was not "as good as it used to be," but that  
23 the reason he was unable to work was that he was

24 emotionally up and down and with the medications that I'm on,  
25 I'm ... tired all the time and with the pain in my back and in  
26 my joints and it's--I would love to go get a job someplace,  
27 but even when I was trying to go to school during some of that  
time and I went to an interview for a job and because of the  
fact that I was going through the VA, they wanted to give me

1 a physical and they gave me a physical and they said that I  
2 couldn't do the job that they had. There was no way that I  
could do it.

3 Tr. 840. Mr. Thebo described himself as an "emotional basket  
4 case." Id.

5 In response to a question about his PTSD from his attorney,  
6 Mr. Thebo testified that he had been in Rwanda burying bodies and  
7 putting lime on them to hasten decomposition. Afterwards, however,  
8 he was ordered to dig the bodies up and burn them. Tr. 841. The  
9 whole time the bodies were being disinterred, "their kids were  
10 watching, because for some reason it was mostly adults that got  
11 sick." Tr. 841-42. Asked about other traumatic assignments, Mr.  
12 Thebo said he was on a security detail guarding United States and  
13 foreign dignitaries, when

14 we got fired on by RPGs and they blew up the vehicle that I  
15 was in, but I was on top so I rolled off the top of the  
vehicle pulling the pin, watched my buddies basically get  
turned into mush in the vehicle.

16 Tr. 842. In addition, Mr. Thebo said he had been exposed to toxic  
17 chemicals when he fired a surface to air ballistic round. Tr. 842.  
18 Mr. Thebo testified that he was getting 100% disability from the VA  
19 for his conditions.<sup>6</sup> Asked to rate his impairments in order of  
20 severity, he testified that the worst was the PTSD, then the "lung  
21 problems," and then "my joint pain." Tr. 846. Mr. Thebo related  
22 that if he fails to take his medications at the precise times  
23

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24 <sup>6</sup> There is no corroboration in the record that Mr. Thebo is  
25 on 100% disability from the VA. The VA records before the court  
26 indicate that Mr. Thebo had a disability rating from the VA of  
27 10% for tinnitus and 10% for a bronchial condition as of January  
1997, tr. 75, and ratings of 30% in October 2002, and 40% in May  
2006 for "bronchial condition." Tr. 535, 625.

1 prescribed, he has "outbursts where like my wife's had to chase me  
2 down the street." Tr. 844. Mr. Thebo said his wife supports the  
3 family financially and "takes care of everything," including  
4 telling him what to wear, leaving chore lists out for the kids,  
5 managing the house, and keeping in touch with everyone in the  
6 family when she is at work. Tr. 846-47.

7 On a bad day, Mr. Thebo said, he can't do anything but sleep,  
8 because "it's like breathing through a wall of Vaseline." Tr. 847.  
9 He said his doctors have attributed his joint pain to different  
10 things, including "scarring from the bombs that, that--I sat on a  
11 platform when I first went in the Military where they blew up C-4  
12 next to me," causing his pants legs to leave red cuts on his legs.  
13 Tr. 848. Another doctor has told him it was "due to the radiation  
14 I was exposed to," which caused "a white, like chalky substance  
15 that builds up in your joints that, you know, because it like  
16 coagulates there..." Tr. 848. Mr. Thebo said he is unable to use  
17 his fingers, to the point that his wife has to button his pants and  
18 shirt. Tr. 849.

19 Mr. Thebo's wife, Michelle, testified. Tr. 852. She said that  
20 on a day to day basis she has to give Mr. Thebo lists because he  
21 "gets sidetracked or he's tired and he doesn't ... care to do it."  
22 Tr. 853. She testified that when she gets home from work she cleans  
23 the house and gets the kids "back in line," as well as paying the  
24 bills because Mr. Thebo can't "handle the stress or deal with that  
25 kind of thing." Tr. 853-54. She said he "doesn't like to go out and  
26 deal with anything," and gets upset very easily, "especially when  
27

1 I request things of him." Tr. 854. She said her husband was unable  
2 to sleep and was "always out, outside walking around the house,"  
3 because he is hypervigilant and paranoid. Id. He does not trust  
4 anyone and as a result, "we don't really get along with our  
5 neighbors very well." Id. Mrs. Thebo said her husband became  
6 "irrationally angry," and didn't "sleep at night because he's  
7 walking and patrolling, essentially," and then slept during the day  
8 so that their three children "have to watch themselves much of the  
9 time." Tr. 855.

10 The ALJ called a vocational expert (VE), Lynn Jones. Tr. 859.  
11 The ALJ asked Ms. Jones to consider a hypothetical individual of  
12 Mr. Thebo's age and education, with his past relevant work, able to  
13 do work at the light exertional level, but with limited climbing,  
14 stooping, crouching and crawling. Tr. 860. The VE testified that  
15 such an individual could not perform Mr. Thebo's past relevant  
16 work, but could do light, unskilled work as a ticketer, table  
17 worker, and assembler of small products. Tr. 860-61. The ALJ added  
18 the limitations of being limited to simple, routine tasks and  
19 instructions, with no public contact, only occasional co-worker  
20 contact, and no teamwork. Tr. 861. The VE opined that such a person  
21 could still perform the table worker job, and could also work as a  
22 garment sorter and a hand stuffer. Tr. 861.

### 23 **Standard**

24 The court must affirm the Commissioner's decision if it is  
25 based on proper legal standards and the findings are supported by  
26 substantial evidence in the record. Meanel v. Apfel, 172 F.3d 1111,  
27



1 1113 (9<sup>th</sup> Cir. 1999). Substantial evidence is such relevant evidence  
2 as a reasonable mind might accept as adequate to support a  
3 conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971);  
4 Andrews v. Shalala, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). In  
5 determining whether the Commissioner's findings are supported by  
6 substantial evidence, the court must review the administrative  
7 record as a whole, weighing both the evidence that supports and the  
8 evidence that detracts from the Commissioner's conclusion. Reddick  
9 v. Chater, 157 F.3d 715, 720 (9<sup>th</sup> Cir. 1998). However, the  
10 Commissioner's decision must be upheld even if "the evidence is  
11 susceptible to more than one rational interpretation." Andrews, 53  
12 F.3d at 1039-40.

13 The initial burden of proving disability rests on the  
14 claimant. Meanel, 172 F.3d at 1113; Johnson v. Shalala, 60 F.3d  
15 1428, 1432 (9<sup>th</sup> Cir. 1995). To meet this burden, the claimant must  
16 demonstrate an "inability to engage in any substantial gainful  
17 activity by reason of any medically determinable physical or mental  
18 impairment which ... has lasted or can be expected to last for a  
19 continuous period of not less than 12 months[.]" 42 U.S.C. §  
20 423(d)(1)(A). A claimant must establish that the current disability  
21 began on or before the date last insured. Tidwell v. Apfel, 161  
22 F.3d 599, 601 (9<sup>th</sup> Cir. 1995); Flaten v. Secretary, 44 F.3d 1453,  
23 1458 (9<sup>th</sup> Cir. 1995).

24 A physical or mental impairment is "an impairment that results  
25 from anatomical, physiological, or psychological abnormalities  
26 which are demonstrable by medically acceptable clinical and  
27

1 laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). This  
2 means an impairment must be medically determinable before it is  
3 considered disabling.

4 The Commissioner has established a five-step sequential  
5 process for determining whether a person is disabled. Bowen v.  
6 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520, 416.920.

7 In step one, the Commissioner determines whether the claimant  
8 has engaged in any substantial gainful activity. 20 C.F.R. §§  
9 404.1520(b), 416.920(b). If not, the Commissioner goes to step two,  
10 to determine whether the claimant has a "medically severe  
11 impairment or combination of impairments." Yuckert, 482 U.S. at  
12 140-41; 20 C.F.R. §§ 404.1520(c), 416.920(c). That determination is  
13 governed by the "severity regulation," which provides:

14 If you do not have any impairment or combination of  
15 impairments which significantly limits your physical or  
16 mental ability to do basic work activities, we will find  
17 that you do not have a severe impairment and are,  
18 therefore, not disabled. We will not consider your age,  
19 education, and work experience.

20 §§ 404.1520(c), 416.920(c). If the claimant does not have a severe  
21 impairment or combination of impairments, the disability claim is  
22 denied. If the impairment is severe, the evaluation proceeds to the  
23 third step. Yuckert, 482 U.S. at 141.

24 In step three, the Commissioner determines whether the  
25 impairment meets or equals "one of a number of listed impairments  
26 that the [Commissioner] acknowledges are so severe as to preclude  
27 substantial gainful activity." Yuckert, 482 U.S. at 140-41. If a  
28 claimant's impairment meets or equals one of the listed  
impairments, he is considered disabled without consideration of her

1 age, education or work experience. 20 C.F.R. s 404.1520(d),  
2 416.920(d).

3 If the impairment is considered severe, but does not meet or  
4 equal a listed impairment, the Commissioner considers, at step  
5 four, whether the claimant can still perform "past relevant work."  
6 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can do so, he  
7 is not considered disabled. Yuckert, 482 U.S. at 141-42. If the  
8 claimant shows an inability to perform his past work, the burden  
9 shifts to the Commissioner to show, in step five, that the claimant  
10 has the residual functional capacity to do other work in  
11 consideration of the claimant's age, education and past work  
12 experience. Yuckert, 482 U.S. at 141-42; 20 C.F.R. §§ 404.1520(f),  
13 416.920(f).

#### 14 **ALJ's Decision**

15 At step two, the ALJ found that Mr. Thebo had the severe  
16 impairments of degenerative disc disease of the lumbar spine and  
17 degenerative joint disease of the ankles. Tr. 23. He found Mr.  
18 Thebo's claimed impairment of PTSD was a "questionable diagnosis  
19 that included credibility issues from his treating sources at the  
20 VA," and concluded, on the basis of the evaluations of Doctors  
21 Phan, Golec and de Young, and the evaluation of reviewing  
22 psychologist Dr. Lahman, that Mr. Thebo had not established,  
23 through objective medical evidence, that his ability to perform  
24 work-related functions was affected by a severe mental impairment.  
25 Tr. 23-24.

26 At step three, the ALJ found that Mr. Thebo did not have an  
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1 impairment or combination of impairments that met or medically  
2 equaled one of the listed impairments in 20 C.F.R. Part 404, Subpt.  
3 P, Appendix 1; the ALJ stated that he had given particular  
4 consideration to Listing 1.00 (musculoskeletal system) in Appendix  
5 1. Tr. 24.

6 The ALJ acknowledged that ordinarily, great weight is given to  
7 the VA's determination of disability unless valid reasons exist for  
8 departing from the VA's findings, citing McCartey v. Massanari, 298  
9 F.3d 1072, 1076 (9<sup>th</sup> Cir. 2002). The ALJ's only stated reason for  
10 not giving great weight to the VA's determination was that it was  
11 based on a standard of disability different from that for Social  
12 Security benefits. Tr. 25. The ALJ also noted, however, that the  
13 only documentation in the record indicating disability of more than  
14 20% is dated 2006 and based on Mr. Thebo's bronchial condition. Id.  
15 The ALJ concluded that because the 2006 document was dated "well  
16 after the claimant's date last insured," "any increased rating in  
17 VA disability thereafter would not affect the decision rendered in  
18 this case." Id.

19 The ALJ found Mr. Thebo's testimony about emotional  
20 instability and PTSD not credible, based on the opinions of Doctors  
21 Phan, de Young, and Golec, that Mr. Thebo's reported symptoms were  
22 internally inconsistent, that the inconsistencies were voluntary  
23 distortions, and that the symptoms were not consistent with a  
24 diagnosis of PTSD. Tr. 24. The ALJ rejected Mr. Thebo's testimony  
25 at the hearing about deficient memory and concentration on the  
26 ground that VA records as late as October 2006 indicated that Mr.

1 Thebo had told treating physician Neal Thompson, M.D., that he was  
2 going to research a medication on the internet before deciding  
3 whether to take it. Tr. 26, citing tr. 631.

4 The ALJ's credibility findings were also based on  
5 inconsistencies between Mr. Thebo's testimony at the hearing and  
6 his self reported activities. Tr. 26. In a Function Report  
7 completed in May 2005, soon after his date last insured, Mr. Thebo  
8 reported that he had the ability to care for his three children  
9 while his wife worked; perform household chores including laundry  
10 and meal preparation; wash his car; grocery shop two to three times  
11 a week; attend church and his children's school; watch movies  
12 almost daily; play fetch with his dog; and walk half a mile before  
13 requiring rest. Tr. 26, citing tr. 102-109.

14 The ALJ noted that MRIs and bone scans of Mr. Thebo's cervical  
15 spine and hands indicated no arthritic changes, and the  
16 degenerative changes seen in the right ankle, shoulders and  
17 sacroiliac joints were characterized as "minimal." Tr. 25.  
18 Moreover, the ALJ found, the neurological evaluation in May 2000 by  
19 Dr. Mante indicated full motor strength in all extremities with no  
20 signs of weakness, atrophy, or abnormal muscle tone. The ALJ also  
21 referred to evidence that Mr. Thebo had been terminated from the  
22 rheumatology clinic for noncompliance. Tr. 25.

23 The ALJ concluded that Mr. Thebo was unable to return to his  
24 past work as a materials handler, which was at the heavy exertion  
25 level, but that he was able to lift 20 pounds occasionally and 10  
26 pounds frequently; stand and walk six hours out of an eight hour  
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1 day; and sit six hours out of an eight hour day. Mr. Thebo was also  
2 limited to occasional climbing, stooping, and crawling. On the  
3 basis of these findings, the ALJ concluded that Mr. Thebo had the  
4 residual functional capacity to perform the light exertion jobs  
5 identified by the VE at the hearing.

### 6 **Discussion**

7 Mr. Thebo asserts that the ALJ erred in not finding him  
8 disabled on the basis of all his impairments in combination;  
9 rejecting the PTSD diagnosis of Dr. Hall; rejecting Mr. Thebo's  
10 subjective symptom testimony; rejecting the testimony of Mr.  
11 Thebo's wife and mother; failing to give proper weight to the  
12 decision of the Department of Veterans' Affairs granting Mr. Thebo  
13 100% disability for his PTSD, respiratory condition, and tinnitus;  
14 and presenting the VE with an incomplete hypothetical.

#### 15 1. ALJ's failure to find that Mr. Thebo was disabled by the 16 combination of his alleged impairments

17 Mr. Thebo asserts in his brief that he is disabled due to  
18 degenerative disk disease of the lumbar spine and degenerative  
19 joint disease of the ankles; asthma/lung disorder; chronic joint  
20 pain/fibromyalgia; fatigue; chronic skin disorder; abnormal liver  
21 chemistry; early onset rheumatoid arthritis; headaches;  
22 gastrointestinal conditions; heart problems; hypertension; and  
23 mental disorders including anxiety, PTSD, depression and possible  
24 bipolar disorder, delusions, paranoia, and pain.

25 The record contains no diagnoses of fibromyalgia, a chronic  
26 skin disorder, rheumatoid arthritis, gastrointestinal conditions,  
27 or heart problems, and no objective evidence that these conditions

1 exist. The ALJ found Mr. Thebo's symptom testimony about headaches,  
2 fatigue and pain not credible; as discussed below, there is  
3 substantial evidence in the record as a whole to support this  
4 finding. In view of the conclusions by two psychiatrists and a  
5 psychologist that Mr. Thebo showed no evidence of psychosis, and  
6 that his reported mental symptoms were inconsistent with one  
7 another, inconsistent with PTSD, and possible voluntary  
8 distortions, there is substantial evidence to support the ALJ's  
9 finding that Mr. Thebo did not suffer from a severe mental  
10 impairment.

11 2. ALJ's credibility findings

12 Mr. Thebo contends that the ALJ erred in finding not credible  
13 1) his testimony that for the last five years he has been unable to  
14 write anything other than his signature because of swelling in his  
15 hands; 2) his testimony that he was "emotionally up and down,"  
16 tired, and suffering from joint pain; 3) his descriptions of the  
17 traumatic episodes in Rwanda and Bosnia; and 4) his statement that  
18 the VA regarded him as 100% disabled.<sup>7</sup>

19 A claimant's testimony about pain may be disregarded if it is  
20 unsupported by medical evidence which supports the *existence* of  
21 such pain, although the claimant need not submit medical evidence  
22 which supports the *degree* of pain. Bunnell v. Sullivan, 947 F.2d  
23 341, 347 (9<sup>th</sup> Cir. 1991) (en banc). The Commissioner's reasons for  
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25 <sup>7</sup> Mr. Thebo acknowledges that the record does not contain  
26 documentation of his current VA disability status, and that the  
27 only documentation of VA disability in the record is the rating  
28 decision in February 1997 of 20% disability.

1 rejecting the claimant's subjective testimony must be "clear and  
2 convincing." Reddick v. Chater, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998).  
3 Examples of clear and convincing reasons include conflicting  
4 medical evidence, effective medical treatment, medical  
5 noncompliance, inconsistent statements, daily activities  
6 inconsistent with the alleged symptoms, a sparse work history, or  
7 testimony that is vague or less than candid. Tommasetti v. Astrue,  
8 533 F.3d 1035, 1040 (9<sup>th</sup> Cir. 2008); Lingenfelter v. Astrue, 504  
9 F.3d 1028, 1040 (9<sup>th</sup> Cir. 2007).

10 The only time the "clear and convincing" standard does not  
11 apply is when there is affirmative evidence suggesting that the  
12 claimant is malingering. Greger v. Barnhart, 464 F.3d 968, 972 (9<sup>th</sup>  
13 Cir. 2006); Carmickle v. Commissioner, 533 F.3d 1155, 1160 (9<sup>th</sup> Cir.  
14 2008). However, the ALJ need not make a specific finding of  
15 malingering. Carmickle 533 F.3d at 1160.

16 There is evidence of malingering in the mental evaluations  
17 given to Mr. Thebo, as well as two physical examinations in which  
18 the physician noted breakaway weakness and inconsistent sensory  
19 testing. However, even if there were no such evidence, the ALJ's  
20 credibility findings are clear and convincing because they are  
21 based on the absence of clinical evidence substantiating Mr.  
22 Thebo's claimed medical conditions, inconsistent statements, daily  
23 activities inconsistent with the alleged symptoms, and medical  
24 noncompliance.

25 The ALJ found that Mr. Thebo's testimony was undermined by his  
26 own statements in May 2005, shortly after his date last insured,  
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1 that he was able to care for his children, do laundry, prepare  
2 meals, wash his car, grocery shop, attend church and his children's  
3 school, play fetch with his dog, and walk half a mile before  
4 needing rest. These statements directly contradict Mr. Thebo's  
5 testimony about inability to use his hands, fatigue, and joint  
6 pain. Moreover, as the ALJ pointed out, Mr. Thebo's Pain  
7 Questionnaire, filled out at approximately the same time as the  
8 Function Report, contradicted some of the statements made in the  
9 Function Report, such as the claim that he was only able to walk a  
10 couple of blocks before needing rest and the claim that he was in  
11 constant pain day and night. Tr. 26. The ALJ's credibility findings  
12 are supported by substantial evidence in the record.

13 There is no evidence that the VA has found Mr. Thebo 100%  
14 disabled. There are passing references to disability ratings of  
15 30% and 40% for a respiratory condition in Mr. Thebo's medical  
16 chart notes, but the only document that evidences a formal  
17 disability finding is, as Mr. Thebo concedes, that of February  
18 1997, finding Mr. Thebo 10% disabled by tinnitus and 10% disabled  
19 by his respiratory condition.

20 With respect to Mr. Thebo's emotional state and traumatic  
21 events, the ALJ found his statements not credible on the basis of  
22 the findings of Doctors Phan, de Young and Golec, discussed above.  
23 I find no error here.

24 3. ALJ's rejection of Dr. Hall's diagnosis

25 The ALJ must resolve conflicts in the medical evidence.  
26 Carmickle, 533 F.3d at 1164. Dr. Hall's opinion that Mr. Thebo had  
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1 PTSD conflicted with the findings of two psychiatrists and a  
2 psychologist who examined Mr. Thebo twice. Dr. Hall's opinion  
3 appears to be based on a single meeting with Mr. Thebo and Mr.  
4 Thebo's descriptions of symptoms. Credibility determinations bear  
5 on evaluations of medical evidence when an ALJ is presented with  
6 inconsistency between a claimant's subjective complaints and his  
7 diagnosed conditions. Webb v. Barnhart, 433 F.3d 683, 688 (9<sup>th</sup> Cir.  
8 2005). The doubts cast on Mr. Thebo's credibility make the  
9 foundation of Dr. Hall's opinion faulty. Moreover, Dr. Hall's  
10 opinion is directly contradicted by those of Doctors Phan, deYoung,  
11 and Golec. The ALJ's rejection of Dr. Hall's opinion was not  
12 erroneous.

13 4. Lay testimony

14 Mr. Thebo asserts that the ALJ should have given more weight  
15 to an undated letter<sup>8</sup> in which Mrs. Thebo described Mr. Thebo's  
16 exposure to C-4 charges during the "Blast Over Pressure" incident;  
17 his symptoms through "the duration of the testing;" his exposure to  
18 a contaminant leaking from a Scud missile; and her observations of  
19 Mr. Thebo's symptoms during and after his military service. I find  
20 no error in the ALJ's refusal to credit inadmissible hearsay  
21 statements based on what Mr. Thebo told his wife, but Mrs. Thebo's  
22 observations of Mr. Thebo's symptoms cannot be disregarded without  
23 comment. Nguyen v. Chater, 100 F.3d 1462, 1467 (9<sup>th</sup> Cir. 1996).

24 Mr. Thebo also asserts that the ALJ should have given more  
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26 <sup>8</sup>The text of the letter indicates that it was written in the  
27 fall of 2000. Tr. 128.

1 weight to an undated and unsigned letter from Julie Thebo, Mr.  
2 Thebo's mother. This letter contains inadmissible hearsay about  
3 what her son's doctors told her, but also contains statements about  
4 her observation of Mr. Thebo's coughing, swollen joints and  
5 fatigue. Lay testimony as to a claimant's symptoms is competent  
6 evidence which the ALJ must take into account, Dodrill v. Shalala,  
7 12 F.3d 915, 919 (9<sup>th</sup> Cir. 1993), unless he expressly decides to  
8 disregard such testimony, in which case "he must give reasons that  
9 are germane to each witness." Id. The ALJ stated only that he had  
10 "considered" the statements from Mr. Thebo's wife and mother, but  
11 did not give specific reasons germane to each of them for  
12 disregarding them. This was error.

13 When an ALJ's error lies in a failure to properly discuss  
14 competent lay testimony favorable to the claimant, a reviewing  
15 court cannot consider the error harmless unless it can confidently  
16 conclude that the error was inconsequential to the ultimate non-  
17 disability decision--that is, no reasonable ALJ, when fully  
18 crediting the testimony, could have reached a different disability  
19 determination. Stout v. Commissioner, 454 F.3d 1050, 1055-56 (9<sup>th</sup>  
20 Cir. 2006).

21 Mr. Thebo's wife wrote that as of the fall of 2000, Mr. Thebo  
22 was constantly short of breath, nauseous, weak, unable to keep down  
23 food, in constant pain from his swollen joints, throwing up blood,  
24 and having blood in his urine. Tr. 128. She stated that her husband  
25 stayed at home and took care of their children, but his shortness  
26 of breath and low energy made watching the children "often too much  
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1 to handle." Id. She wrote that Mr. Thebo had blackouts when he  
2 coughed too hard and afterwards was difficult to awaken and unable  
3 to get out of bed for hours. Id.

4 Mr. Thebo's mother wrote that Mr. Thebo was in constant pain,  
5 had swollen joints, perspired profusely and turned gray while  
6 attempting to do a task as simple as eating a meal, tired easily,  
7 coughed constantly, which created "great pain at the base of the  
8 skull," and "often coughs up blood." Tr. 122.

9 It is axiomatic that the claimant must establish the existence  
10 of a *medically determinable* physical or mental impairment that  
11 prevents him from engaging in any substantial gainful activity.  
12 Consequently, the ALJ's improper rejection of the testimony of Mr.  
13 Thebo's wife and mother can only be inconsequential to the ALJ's  
14 non-disability decision if there is no evidence of a medically  
15 determinable cause for the symptoms they observed, or if their  
16 testimony is based on statements made to them by Mr. Thebo, whose  
17 credibility has been questioned.

18 The two women described the following symptoms: shortness of  
19 breath; weakness; nausea; inability to keep down food; constant  
20 pain; swollen joints; vomiting blood; blood in the urine; coughing  
21 up blood; blackouts followed by stupor; perspiration and pallor at  
22 the simplest task, such as eating; and pain in the back of the  
23 skull caused by coughing.

24 The medical evidence establishes that Mr. Thebo has a  
25 bronchial condition, but the condition is described as  
26 "reversible," see, e.g., tr. 438, and controlled with albuterol  
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1 and guaifenesin (although Mr. Thebo reported that he had stopped  
2 taking Azmacort and albuterol because they gave him a sore throat.  
3 Tr. 549.) There is no medical evidence of heart disease, which  
4 could account for severe shortness of breath: chest x-rays have  
5 been consistently normal, a CT scan of the chest was unremarkable,  
6 and an echocardiogram was normal. In February 2000, examining  
7 physician Joseph Sanchez wrote that he had observed no hemoptysis  
8 and that he doubted Mr. Thebo's report of massive hemoptysis. With  
9 respect to the blackouts followed by stupor, a complete  
10 neurological workup revealed no evidence of seizures, with all  
11 neurological tests within normal limits. The two women's testimony  
12 that Mr. Thebo had shortness of breath, hemoptysis, blackouts, and  
13 headaches caused by coughing is necessarily based, at least in  
14 part, on the dubious credibility of Mr. Thebo.

15       There is no clinical evidence of a condition that could cause  
16 general weakness. Physical examinations showed normal muscle tone  
17 and strength and normal enervation, except for suggestions of  
18 malingering such as breakaway muscle weakness and an inconsistent  
19 sensory examination. See, e.g., tr. 401, 409, 416. Dr. Mante's  
20 neurological examination revealed normal cranial nerves, no  
21 weakness, atrophy or abnormal muscle tone of the motor system,  
22 brisk reflexes, normal sensory examination, no signs of ataxia, and  
23 normal gait. Dr. Casey's neurology examination yielded similar  
24 results. Bone scans and x-rays indicated only mild or minimal  
25 degenerative disc or joint disease.

26       Chart notes indicated no findings of swollen joints or obvious  
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1 arthritis upon physical examination. See, e.g., tr. 427, 433. On  
2 April 6, 2000, Robert Paine, M.D., indicated that he thought a  
3 rheumatoid condition unlikely based on lab results. Tr. 427.

4       Neurological workups and MRIs of the brain and cervical spine  
5 done in response to Mr. Thebo's complaints of headache were normal.

6       There is no evidence of a condition that could cause nausea  
7 and an inability to keep food down. A gastric emptying scan showed  
8 no evidence of gastroesophageal reflux. Numerous chart notes refer  
9 to Mr. Thebo's obesity. See, e.g., tr. 420, 437, 786, 799 (chart  
10 note dated May 19, 2006: "likes to eat and is overweight but has  
11 lost weight with Atkins diet"). At an interview on March 6, 2002,  
12 Mr. Thebo stated that he ate five or more servings of fruits or  
13 vegetables every day and six or more servings of grain products  
14 every day; he also stated that he had not had any unintentional  
15 weight loss in the past three months. Tr. 533. Urinalyses were  
16 within normal limits. See, e.g., tr. 548, 557, 617-18.

17       Mr. Thebo's skin rash was diagnosed as folliculitis, and a  
18 biopsy requested by Mr. Thebo confirmed the diagnosis. Tr. 622-23.

19       In summary, Mr. Thebo's medical evidence does not contain  
20 objective findings of a condition that would account for the  
21 symptoms reported by Mr. Thebo's wife and mother, to the extent  
22 that testimony is not based on Mr. Thebo's statements to them.  
23 Accordingly, I conclude that even if their testimony were credited,  
24 no reasonable ALJ could conclude on the basis of the entire record  
25 that Mr. Thebo was disabled. The ALJ's failure to provide reasons  
26 for rejecting this evidence was harmless error.

1           5.   Hypothetical to VE

2           Mr. Thebo asserts that the ALJ erred by not including in the  
3 hypothetical to the VE additional limitations proposed by his  
4 attorney, including inability to perform simple routine tasks, and  
5 being required to miss more than two days of work per month. This  
6 argument is unpersuasive.

7           Although the ALJ must propose a hypothetical to a VE that is  
8 based on medical assumptions supported by substantial evidence in  
9 the record that reflects each of the claimant's limitations, see,  
10 e.g., Osenbrock v. Apfel, 240 F.3d 1157, 1163 (9<sup>th</sup> Cir. 2001), the  
11 ALJ is free to reject restrictions in a hypothetical question that  
12 are not supported by substantial evidence. Id. at 1165. If the  
13 claimant fails to present evidence that he suffers from certain  
14 limitations, the ALJ need not include those alleged impairments in  
15 the hypothetical question to the VE. Id. at 1164.

16           There is no evidence in the record that Mr. Thebo is so  
17 cognitively impaired that he is unable to do even simple, routine  
18 tasks. As the ALJ noted, Mr. Thebo's self report of May 2005, in  
19 which he said he was able to care for his children, prepare meals,  
20 grocery shop, and attend church and the children's school, and his  
21 statement to Dr. Thompson that he intended to do internet research  
22 on a medication, strongly suggest otherwise. Nor is there any  
23 medical evidence of a condition that would require Mr. Thebo to be  
24 absent from work more than two days a month. I therefore find no  
25 error in the ALJ's decision not to include the limitations proposed  
26 by Mr. Thebo's attorney in the hypothetical to the VE.

1 The decision of the Commissioner is affirmed.

2 IT IS SO ORDERED.

3 Dated this 2<sup>nd</sup> day of December, 2009.

4  
5 /s/ Dennis James Hubel

6 Dennis James Hubel  
7 United States Magistrate Judge  
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